COLORADO COURT OF APPEALS

DATE FILED: March 5, 2020
CASE NUMBER: 2017CA1696

Court of Appeals No. 17CA1696
Douglas County District Court No. 16DR30446
Honorable Gary M. Kramer, Judge

In re the Marriage of

Renee M. Gregoire-Davis,

Appellant,

and

John H. Davis,

Appellee.

JUDGMENT AFFIRMED IN PART, REVERSED IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division IV
Opinion by JUDGE HARRIS
Bernard, C.J., and Fox, J., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced March 5, 2020

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Van Horn Family Law, PC, William Van Horn, Rachel A. Stokowski, Littleton, Colorado, for Appellee

¶ 1 Renee M. Gregoire-Davis (wife) appeals the property division and maintenance portions of the district court's permanent orders entered in connection with her legal separation from John H. Davis (husband).[1] We affirm in part, reverse in part, and remand the case to the district court for further proceedings.

I. Background

¶ 2 The parties were married for approximately thirty years. In 2016, wife petitioned for legal separation.

¶ 3 Following a two-day hearing, the district court entered detailed permanent orders and a decree of legal separation. As relevant here, the district court found that husband, a former tax accountant, was receiving retirement benefits under two separate employer plans: a fixed monthly benefit of $19,863 for 121 months from a Long-Term Compensation Plan, and $2978 per month for life from a Retirement Allowance Plan (collectively, the retirement benefits). Over wife's objection, the court characterized the retirement benefits as income, rather than marital property. Then,

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[1] In her briefs, wife also challenged the appointment of a special master. However, because wife withdrew this claim of error at oral argument, we do not address it. *See In re Marriage of Morton*, 2016 COA 1, ¶ 37.

based on the monthly benefits amount, as well as the additional $11,159 per month husband earned from independent contract work, the court ordered husband to pay wife $12,000 per month in maintenance until her remarriage or death.

¶ 4 The court also allocated the parties' significant tax debt. Rejecting wife's argument that husband was solely to blame for the parties' failure to pay federal and state income taxes, the court divided the tax debt equally between them.

II. Property Division

A. Retirement Benefits

¶ 5 Wife contends that the district court erred as a matter of law by failing to treat husband's retirement benefits as marital property subject to distribution. We agree.

¶ 6 A district court's distribution of property between spouses upon dissolution is controlled by the Uniform Dissolution of Marriage Act, §§ 14-10-101 to -133, C.R.S. 2019. Under section 14-10-113(1), C.R.S. 2019, the court "shall divide the marital property," in such proportions as it deems just and equitable. *See In re Marriage of Cardona*, 2014 CO 3, ¶ 12 ("Once an interest is

deemed to be marital property, the court must value the property in order to make an equitable distribution.").

¶ 7 Husband properly concedes that the retirement benefits are marital property. *See, e.g.*, *In re Marriage of Grubb*, 745 P.2d 661, 665 (Colo. 1987) (A spouse's interest in an employer-supported pension plan "is marital property subject to equitable distribution in a dissolution proceeding.").

¶ 8 Nonetheless, he contends, and the district court apparently agreed, that because the retirement benefits were in payout status, the court had discretion to treat them as income not subject to equitable distribution but calculable only for purposes of determining maintenance.

¶ 9 The fact that husband was receiving retirement benefits at the time of the permanent orders hearing does not render the benefits income as opposed to divisible marital property. *See In re Marriage of Gallo*, 752 P.2d 47, 54 (Colo. 1988) (husband's military retirement benefits, in payout status at the time of dissolution, constituted marital property to be divided between the spouses); *In re Marriage of Zappanti*, 80 P.3d 889, 892 (Colo. App. 2003) (husband's Tier II railroad retirement benefits, in payout status at

time of dissolution, constituted marital property requiring an equitable division); *In re Marriage of Fenimore*, 782 P.2d 872, 873 (Colo. App. 1989) (husband's Civil Service Employee Pension Plan benefits, in payout at time of dissolution, were marital property subject to division).

¶ 10 True, the maintenance statute defines "gross income" to include "[p]ension payments and retirement benefits actually received that have not previously been divided as property in this action." § 14-10-114(8)(c)(I)(H), C.R.S. 2019. But that statute does not direct the court to treat retirement benefits as income *rather than* marital property; instead, it provides that certain retirement benefits should not constitute *both* income and marital property.

¶ 11 Ordinarily, a spouse's share of divided retirement benefits is also treated as income for purposes of maintenance and child support. *See Zappanti*, 80 P.3d at 895 ("[T]he fact that the retirement [benefit] represented a property interest subject . . . to division does not change its status as an income source to be considered in determining [husband's] child support obligation."). But unlike the child support statute, which includes in its definition of income any pension or retirement benefits, *see* § 14-

10-115(5)(a)(I)(H), C.R.S. 2019, the maintenance statute's definition of income includes only pension and retirement benefits that have been "actually received" and "have not previously been divided as property," § 14-10-114(8)(c)(I)(H). Thus, section 14-10-114(8)(c)(I)(H) does not affect whether a spouse's interest in a retirement or pension plan constitutes marital property subject to equitable division (our supreme court has repeatedly held that it does), but rather whether the spouse's share can also be treated as income for purposes of calculating maintenance.

¶ 12 In sum, while the district court had discretion to choose a method of valuation, *see In re Marriage of Hunt*, 909 P.2d 525, 530-31 (Colo. 1995) (explaining the net present value, deferred distribution, and reserve jurisdiction methods),[2] and discretion to fashion an equitable division of the parties' property, it did not have discretion to refuse to value the retirement benefits and distribute them as marital property, *Gallo*, 752 P.2d at 54. (Once divided as

[2] Because the retirement benefits are in payout status, the net present value is the preferred valuation method. *See In re Marriage of Zappanti*, 80 P.3d 889, 895 (Colo. App. 2003).

property, however, husband's share of the benefits will not also constitute income under the maintenance statute.)

¶ 13 Accordingly, we reverse this portion of the judgment and remand the case to the district court to include husband's retirement benefits in the marital estate, value them, and divide them equitably. *See* § 14-10-113(1), (5).

B. Tax Debt

¶ 14 Next, wife contends that the district court erred by dividing the parties' tax debt equally because, she says, "it was his [misconduct] that resulted in the tax debts." We disagree.

¶ 15 The allocation of the parties' debts is in the nature of property division. *See In re Marriage of Nevarez*, 170 P.3d 808, 814 (Colo. App. 2007). So, the broad discretion afforded the district court in effecting an equitable marital property division based on the case's facts and circumstances extends to its allocation of marital debts. *See id.*

¶ 16 The district court must first determine whether a particular debt is marital, which is subject to division, or separate, which is not. *In re Marriage of Jorgenson*, 143 P.3d 1169, 1171-72 (Colo. App. 2006). "Marital liabilities include all debts that are acquired

and incurred by a husband and wife during their marriage." *Id.* at 1172.

¶ 17 The parties' tax debt was indisputably incurred during the marriage. Whether husband engaged in misconduct or not, the taxes were due and owing and, if paid on time, would have been paid with marital funds. In other words, contrary to wife's argument, the principal tax liability was not a result of husband's misconduct but of his substantial income. Thus, dividing the marital property equally and then allocating all of the tax debt to husband would result in a windfall to wife.

¶ 18 The parties apparently incurred fines and penalties, in addition to the principal amount of the tax liability, due to husband's failure to timely pay the taxes. And if wife had argued in the district court that the *fines and penalties* should have been allocated solely to husband, that argument would at least have had some logical appeal. But she did not — she asked the district court to shift *all* of the tax debt to husband. The court did not abuse its discretion in declining that request. *See Nevarez*, 170 P.3d at 814; *see also In re Marriage of Ensminger*, 209 P.3d 1163, 1167 (Colo.

App. 2008) (arguments not raised to the district court will not be addressed for the first time on appeal).

III. Issues on Remand

¶ 19 In light of our order reversing the district court's property division, the court on remand may reconsider and effectuate a new equitable division of the marital estate. *See In re Marriage of Balanson*, 25 P.3d 28, 42 (Colo. 2001); *see also In re Marriage of Vittetoe*, 2016 COA 71, ¶ 38 ("If any new division impacts the fairness of the overall property and debt division, on remand, the court may revisit its entire property and debt division, but it need do so only if reconsideration is necessary to achieve an equitable result.").

¶ 20 And because awards of spousal maintenance "flow from the property distribution," on remand, the district court must also reevaluate maintenance based on the updated property division. *In re Marriage of Koning*, 2016 CO 2, ¶ 26.[3]

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[3] The district court ordered each party to pay its own attorney fees and expert witness fees above the $77,000 incurred as of the date of permanent orders. Neither party has suggested that this portion of the order needs to be revisited on remand, but we leave that to the district court's discretion. *See In re Marriage of Koning*, 2016 CO 2,

¶ 21 In revisiting the property distribution and maintenance, the court must consider the parties' current economic circumstances. *See In re Marriage of Wells*, 850 P.2d 694, 696 (Colo. 1993).

IV. Appellate Attorney Fees

¶ 22 Asserting that the parties' financial resources are disparate, wife requests her appellate attorney fees under section 14-10-119, C.R.S. 2019. Because the district court is better equipped to resolve factual issues regarding the parties' relative economic circumstances and abilities to pay their attorney fees, the district court should address her request on remand. *See* C.A.R. 39.1; *In re Parental Responsibilities Concerning D.T.*, 2012 COA 142, ¶ 27.

¶ 23 Likewise, husband requests his appellate attorney fees under C.A.R. 38(b), C.A.R. 39.1, and section 14-10-119, but on the basis that wife's appeal is frivolous and groundless. The purpose of section 14-10-119, however, is to equalize the parties' financial positions and not to punish a party. *See In re Marriage of Anthony-Guillar*, 207 P.3d 934, 944 (Colo. App. 2009); *see also In re Marriage*

¶ 26 ("When a trial court is required to revisit a property division, it must also reevaluate . . . attorney's fees awards in light of the updated property division, because the issues are interdependent.").

of Trout, 897 P.2d 838, 840 (Colo. App. 1994) (while the district court may consider a party's actions in initiating unwarranted proceedings when determining whether to award attorney fees under section 14-10-119, the award should be primarily a means of apportioning the costs and fees of an action equitably between the parties and not a means of punishing a party). In any event, given our disposition, we deny his request.

V. Conclusion

¶ 24 The property division portion of the judgment is reversed, and the case is remanded to the district court for further proceedings consistent with this opinion. In all other respects, the judgment is affirmed.

CHIEF JUDGE BERNARD and JUDGE FOX concur.

Court of Appeals

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PAULINE BROCK
CLERK OF THE COURT

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Steven L. Bernard
Chief Judge

DATED: March 5, 2020

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